(6)

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 96-8653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR PETITIONER

STEPHEN E. HARRIS
Public Defender of Maryland
ARTHUR A. DELANO, JR. *
NANCY S. FORSTER
Assistant Public Defenders
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8556

* Counsel of Record

Counsel for Petitioner

23 PP

QUESTION PRESENTED

Did the introduction at a joint trial of a redacted confession of a nontestifying codefendant deprive Petitioner of his Sixth Amendment right of confrontation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CO-DEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT	8
A. The redacted statement of codefendant Bell was "incriminating on its face."	11
B. The redacted statement of codefendant Bell when viewed in context was even more "powerfully incriminating."	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Bruton v. United States, 391 U.S. 123 (1968) ..... *passim*
Burgett v. Texas, 389 U.S. 109 (1967) 9
Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985) 16
Commonwealth v. Sanford, 323 Pa. Super 436, 470 A.2d 998 (1984) 12
Cruz v. New York, 481 U.S. 186 (1987) 10
Delli Paoli v. United States, 352 U.S. 232 (1957) 9
Douglas v. Alabama, 380 U.S. 415 (1965) 10
Foster v. United States, 548 A.2d 1370 (D.C. App. 1989) 15
Gray v. State, 107 Md. App. 311, 667 A.2d 983 (1995) 1, 16-17
Greer v. Miller, 483 U.S. 756 (1987) 17
Gutierrez v. State, 270 Ind. 639, 388 N.E.2d 520 (1979) 14
Harrington v. California, 395 U.S. 250 (1969) 10
Harris v. State, 218 Ga. App. 472, 462 S.E.2d 425 (1995) 12
Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978) 12
Jackson v. Denno, 378 U.S. 368 (1964) 9
Krulewitch v. United States, 336 U.S. 440 (1949) 9
Lee v. Illinois, 476 U.S. 530 (1986) 10
McDonald v. State, 436 S.E.2d 811 (Ga. Ct. App. 1993) 13
People v. Banks, 438 Mich. 408, 475 N.W.2d 769 (1991) *cert. denied*, 502 U.S. 1065 (1992) 13
People v. Cruz, 121 Ill.2d 321, 521 N.E.2d 18 (1988) 15
People v. Fletcher, 13 Cal. 4th 451, 917 P.2d 187 (1996) 14
People v. Kahn, 200 A.D. 129, 613 N.Y.2d 198 (1994) 15
Pointer v. Texas, 380 U.S. 400 (1965) 9
Richardson v. Marsh, 481 U.S. 200 (1987) ..... *passim*
Schneble v. Florida, 405 U.S. 427 (1972) 10
Smith v. United States, 561 A.2d 468 (D.C. 1989) 16
State v. Butler, 257 Kan., 916 P.2d 1 (1996) 13
State v. Craney, 662 A.2d 899 (Me. 1995) 12

TABLE OF AUTHORITIES—Continued

Page

State v. Gray, 344 Md. 417, 687 A.2d 660 (1997) 1
State v. Johnson, 71 N.C. App. 90, 321 S.E.2d 510 (1984) 15
State v. Tucker, 10 Haw. App. 43, 861 P.2d 24 (1993) 15
Tennessee v. Street, 471 U.S. 409 (1985) 10
Tome v. United States, 513 U.S. 150 (1995) 9
United States v. Belle, 593 F.2d 487 (3d Cir. 1979) 12
United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966) 12-13
United States v. Danzey, 594 F.2d 905, (2d Cir. 1979) *cert. denied*, 441 U.S. 951 (1979) 13
United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976) 14
United States v. Donohue, 948 F.2d 438 (8th Cir. 1991) 12
United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1988) 12
United States v. Hoac, 990 F.2d 1099, 1105 (9th Cir. 1993) 12
United States v. Long, 900 F.2d 1270 (8th Cir. 1990) 13
United States v. Strickland, 935 F.2d 822 (7th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992) 12
United States v. Van Hemelryck, 945 F.2d 1493 (11th Cir. 1991) 15
United States v. Vogt, 910 F.2d 1184 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991) 12
United States v. Williams, 936 F.2d 698 (2d Cir. 1991) 12

United States Constitution:

Sixth Amendment ..... *passim*

Statutes:

28 U.S.C. 1257(a) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-8653

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported, *State v. Gray*, 344 Md. 417, 687 A.2d 660 (1997), and is reproduced in the petition for writ of certiorari. (Cert. Pet. Apx. 1-23).

The opinion of the Court of Special Appeals of Maryland is reported, *Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995), and is reproduced in the petition for writ of certiorari. (Cert. Pet. Apx. 24-46).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland affirming the judgment of conviction entered against Petitioner, Kevin D. Gray was filed on January 15, 1997. The petition for writ of certiorari was filed on April 15, 1997 and was granted on June 16, 1997.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

Petitioner and codefendant Anthony Bell were charged with the murder of Stacey Williams. The State alleged that Williams died as a result of a beating by Petitioner, Anthony Bell, Jacquin Vanlandingham (hereinafter Tank), and several other young men.[1] Bell gave a written statement to the police in which he incriminated himself, Petitioner, and Tank. (J.A. 57) Petitioner gave an exculpatory oral statement to the police.[2]

Petitioner moved to sever his case from that of codefendant Bell on the ground that Bell's statement incriminated him. (J.A. 4) The motion to sever defendants was heard in the Circuit Court for Baltimore City by the Honorable Andre M. Davis. Judge Davis denied the motion to sever on the grounds that Bell's statement could "be sanitized in about three different spots so as

[1] The jury was told that Tank was fatally shot two days after the beating. (T. 99-100, June 22, 1994)

[2] In his statement, Petitioner denied beating Williams. Petitioner told Detective Homer Pennington, Baltimore City Police Department, that he was on the telephone when Williams was beaten. (T. 38, June 22, 1994)

to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray." (J.A. 8)

At trial, Bell's redacted statement was introduced into evidence by Detective Homer Pennington: [3]

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.

[3] The trial judge granted Petitioner a continuing objection to Bell's statement. (T. 22-25, June 22, 1994) Before Bell's statement was introduced into evidence, the trial judge instructed the jury as follows:

> THE COURT: Thank you, Mr. Amaral. Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant. You may proceed, Ms. Saxon. (J.A. 10)

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, deleted, deleted, and a few other guys.

Question, do you know the other guy's name?

Answer, deleted, deleted, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and deleted?

Answer, some money that Stacey owed deleted.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yes.

Question, who else has these jackets?

Answer, deletion.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it. (J.A. 10-12)[4]

Immediately after Bell's statement was read into evidence, the prosecutor asked the following question:

[4] Bell's redacted confession was admitted into evidence as State's Exhibit 5B (J.A. 65-68). Bell's redacted confession contains blank spaces where the names Kevin and Tank had been removed.

Q All right, now officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?

A That's correct. (J.A. 12)

Two additional witnesses testified for the prosecution. Tracy Brumfield testified that she saw Stacey Williams being chased down the street by Tank, Petitioner, and several other guys. (T. 92, June 21, 1994) Williams looked scared. (T. 96) Shay Yarberough, 15 years old, testified that he saw Williams being beaten. (T. 111, June 21, 1994) Yarberough testified that Tank, Bell, Petitioner and three other guys confronted Williams and asked Williams "where their money at." (T. 112, June 21, 1994). Tank banged Williams in the mouth. (T. 112, June 21, 1994) Tank kicked Williams several times. (T. 112, June 21, 1994) Tank then picked Williams up and "DDT'd him" three times.[5] (T. 113, June 21, 1994) According to Yarberough, Petitioner tried to DDT Williams, but he couldn't get Williams all of the way up in the air, so he just dropped Williams on his head. (T. 113, June 21, 1994). After Tank dropped Williams for the third time, they stomped him again. (T. 114, June 21, 1994). Yarberough described codefendant Bell as the leader of the group. (T. 119, June 21, 1994) Yarberough further testified that the guys in this group wore jackets that said "Park Heights" when it was cold outside. (T. 116, June 21, 1994).

Petitioner denied beating Williams. (T. 6, June 23, 1994) Petitioner testified that he was talking on the phone with his girlfriend at the time of the beating. (T. 7, June 23, 1994) Petitioner called several other witnesses to support his claim that he was not involved in the beating. (T. 174-196, June 22, 1994)

[5] DDT is apparently a World Wrestling Federation term for picking someone up off the ground and then dropping him head first to the mat.

The jury acquitted Petitioner of second degree murder and convicted him of involuntary manslaughter. (T. 2-3, June 24, 1994) Petitioner was subsequently sentenced to ten years imprisonment with all but seven years suspended. (T. 19-20, August 1, 1994)

In reversing Petitioner's conviction, the Court of Special Appeals of Maryland found that under the circumstances of this case "the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words deleted and deletion, and the reading of that statement before a jury, violates a defendant's right under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor." (J.A. 71) The Court of Special Appeals reasoned that, in the context of the other evidence at trial, the mere deletion of Petitioner's name and Tank's name did not effectively make Bell's statement nonincriminating as to Petitioner. (J.A. 83) There existed, in other words, a "substantial risk" that the jury considered Bell's statement in deciding Petitioner's guilt. (J.A. 83-84)

In affirming Petitioner's conviction, the Court of Appeals of Maryland, with two judges dissenting,[6] held that the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," and the reading of that statement before a jury, does not violate a defendant's rights under the Confrontation Clause of the Sixth Amendment, if the jury is instructed to consider the statement only against the codefendant-confessor and the statement does not "compel" a directly inculpating inference between the redacted confession and the nonconfessing codefendant. (J.A. 100-101) The Court of Appeals went on to explain that "the compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate." (J.A. 101)

[6] The dissenting judges held that "we would affirm the judgment of the Court of Special Appeals for the reasons set forth in Judge Cathell's excellent opinion for that court." (J.A. 108)

SUMMARY OF ARGUMENT

In *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that a defendant is deprived of his Sixth Amendment right of confrontation when a confession of a nontestifying codefendant which incriminates the defendant is introduced at their joint trial, even if the trial court specifically instructs the jury to consider that confession only against the codefendant. The confession in *Bruton* identified the defendant by name.

In *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the Court held that a defendant is not deprived of his Sixth Amendment right of confrontation by the admission of a nontestifying defendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

This case presents for resolution the question left unanswered in *Richardson*, 481 U.S., at 211 n.5: whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using "a symbol or neutral pronoun," violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor.

Bruton is premised upon the belief that, given the practical and human limitations of the jury system, a jury cannot be relied upon to disregard "powerfully incriminating" evidence even if instructed to do so. The introduction of a confession of a nontestifying codefendant, which has been redacted to exclude the defendant's

name by using blank spaces and the terms "deleted" or "deletion," is "powerfully incriminating." A jury cannot be relied upon to follow an instruction to simply disregard the confession of a nontestifying codefendant which has been redacted in this manner.

A confession, which had been redacted to exclude the name of the defendant by using blank spaces and the terms "deleted" or "deletion," is incriminating on its face. Rather than eliminating any reference to the defendant's existence as in *Richardson*, a confession, which had been redacted to exclude the name of the defendant by using blank spaces and the terms "deleted" or "deletion" draws the jury's attention to the fact that the names of other persons, known to the codefendant, have been purposely omitted. A confession which has been redacted by using blank spaces and the terms "deleted" or "deletion" all but invites the jury to fill in the blanks with the name of the defendant. If a confession, which had been redacted to exclude the name of the defendant by using blank spaces and the terms "deleted" or "deletion," is viewed in the context of the other evidence presented at trial, its admission is even more "powerfully incriminating." The use of blank spaces or the terms "deleted or deletion" in redacted statements is simply insufficient to protect a defendant against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135.

ARGUMENT

THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CO-DEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of an accused to confront the

witnesses against him includes the right of cross-examination. *Pointer v. Texas*, 380 U.S. 400, 404, 406-407 (1965).

A defendant is deprived of his Sixth Amendment right of confrontation when a confession of a nontestifying codefendant which incriminates the defendant is introduced at their joint trial. *Bruton*, 391 U.S., at 126. A defendant is deprived of his right of confrontation even where the court specifically instructs the jury that the codefendant's confession can only be considered as evidence against the codefendant. *Bruton*, 391 U.S., at 137.[7] In repudiating the assumption that "this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence," *Id.*, at 128, the Court recognized:

> "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully

---

[7] *Bruton* overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957). *Id.*, at 126. In *Delli Paoli*, 352 U.S. at 239, the Court had held that it was "reasonably possible for the jury to follow" sufficiently clear instruction to disregard a codefendant's inculpatory confession. As Justice Brennan observed for the Court in *Bruton*, 391 U.S., at 126, "since *Delli Paoli* was decided this Court has effecitvely repudiated its basic premise." *See, Jackson v. Denno*, 378 U.S. 368 (1964) (jury could not be relied upon to follow instruction to disregard an involuntary confession); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (jury could not be relied upon to follow instructions to disregard admission of a prior criminal conviction which is constitutionally infirm). *Cf., Tome v. United States*, 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (jurors unlikely to follow instructions limiting use of prior inconsistent statements); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., dissenting) (the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be a fiction).

> incriminating extrajudicial statements of a codefendant, who stands side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed" *Id.*, at 135-136 [8]

A confession of a nontestifying codefendant which incriminates a defendant is generally not admissible at a joint trial because it is so "powerfully incriminating." *Bruton*, 391 U.S. at 135.

Under some circumstances, however, a nontestifying codefendant's *redacted* confession may be admitted at their joint trial.[9] The Confrontation Clause is not violated by

[8] The Court has long noted that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986); *Bruton v. United States*, 391 U.S., at 138 (Stewart, J., concurring); *Bruton v. United States*, 391 U.S., at 141 (White, J., dissenting). *See also, Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (conviction reversed because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor and the accomplice subsequently invoked his privilege against self-incrimination).

[9] The erroneous admission of a nontestifying codefendant's confession may also be deemed harmless. *Harrington v. California*, 395 U.S. 250, 254 (1969); *Schneble v. Florida*, 405 U.S. 427, 430 (1972). *See also Cruz v. New York*, 481 U.S. 186, 191-193 (1987); *Tennessee v. Street*, 471 U.S. 409 (1985) (defendant's rights under the Confrontation Clause were not violated by introduction of an accomplice's confession for the nonhearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from the accomplice's statement).

the admission of a nontestifying defendant's confession with a proper limiting instruction when "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S., at 211.[10] A confession which has been redacted to eliminate not only the defendant's name, but any reference to his or her existence, is not "incriminating on its face." *Id.*, 481 U.S., at 208. Where a confession is not incriminating on its face, and becomes so only when linked with other evidence introduced at trial,

> "it is a *less valid generalization* that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is *more vivid* than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. *Id.*, 481 U.S., at 208.[11] (Emphasis added)

A. Codefendant Bell's Redacted Statement Was "Incriminating on its Face."

The introduction of codefendant Bell's confession, which had been redacted to exclude Petitioner's name and the

[10] In *Richardson*, 481 U.S., at 211 n.5, the Court specifically "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."

[11] In *Richardson*, 481 U.S., at 211, the Court recognized that the rule "that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant and the criminal process."

name of another known accomplice by using blank spaces and the terms "deleted" or "deletion," clearly deprived Petitioner of his Sixth Amendment right of confrontation. Codefendant Bell's redacted confession remained "powerfully incriminating" on its face despite the elimination of Petitioner's name.[12]

The use of blank spaces or the terms "deleted" or "deletion" was an ineffective means of redaction because the use of blank spaces or the terms "deleted" or "deletion" drew the jury's attention to, rather than away from, the fact that the names of other persons, known to co-defendant Bell, had been purposely omitted.[13] The con-

[12] The majority of federal circuits have adopted the "facial implication" doctrine for assessing whether or not a nontestifying codefendant's redacted confession may be introduced at a joint trial. Under this doctrine, the redacted confession must "be viewed in isolation from the other evidence introduced at trial." *United States v. Williams*, 936 F.2d 698 (2d Cir. 1991). If "the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction, even though the other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant." *Id.*, at 700. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993); *United States v. Strickland*, 935 F.2d 822, 825-26 (7th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992); *United States v. Donohue*, 948 F.2d 438, 444 (8th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988); *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979); *Hodges v. Rose*, 570 F.2d 643, 646-47 (6th Cir. 1978), *cert. denied*, 436 U.S. 909 (1978). A number of States have also adopted the "facial implication" standard. *Harris v. State*, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995); *Commonwealth v. Sanford*, 323 Pa. Super, 436, 439-40, 470 A.2d 998, 999-1000 (1984).

[13] In *Bruton*, 391 U.S., at 129 n.4, the Court cited with approval an opinion by Judge Henry Friendly in *United States v. Bozza*, 365 F.2d 206 (2nd Cir. 1966) in which the U.S. Court of Appeals for the Second Circuit reversed the judgment of a conviction because the trial judge had allowed the prosecutor to read a codefendant's confession to the jury with the word "blank" replacing the defendant's name. In reversing, Judge Friendly wrote that "it is impossible realistically to suppose that when twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind." *Id.*, at 215. Judge Friendly, writing for the court, then concluded, "there is a point where the credibility as to the efficacy of such [limiting] instructions with respect to a confession implicating codefendants is overstrained, and this point was reached here." *Id.*, at 217.

fession which had been redated by using blank spaces and the terms "deleted" or "deletion" was, in effect, a "a red flag." The use of blank spaces or the terms "deleted" or "deletion" all but invited the jury to fill in the blanks with the names of Petitioner and Tank. *See, United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990). Unlike the redaction in *Richardson*, 481 U.S., at 208, the use of blank spaces and the terms "deleted" or "deletion" in Bell's redacted statement actually pushed the jury "onto the path of" inferential incrimination. *See, e.g., State v. Butler*, 257 Kan. 1110, 916 P.2d 1 (1996) (leaving blank spaces in place of the defendant's name made it obvious that defendant's name had been redacted); *McDonald v. State*, 210 Ga. App. 689, 436 S.E.2d 811, 813 (1993) (Simply removing the name of the co-defendants and inserting in lieu thereof a "blank" was not sufficient to avoid a *Bruton* violation since each defendant had two other codefendants, the jury would readily fill in the blanks with the names of the co-defendants); *People v. Banks*, 438 Mich. 408, 475 N.W.2d 769 (1991), *cert. denied*, 502 U.S. 1065 (1992) (Use of blanks was ineffective where "third person" and his actions were so described as to leave no doubt that it was the third person on trial—the defendant); *United States v. Danzey*, 594 F.2d 905, 919 (2d Cir. 1979) *cert. denied*, 441 U.S. 951 (1979) (jury invited to fill in defendant's name when jury told that codefendant had used names

in original statement); *Gutierrez v. State*, 270 Ind. 639, 388 N. E. 2d 520, 527 (1979) (A blank or "x" that, by reasonable inference, refers to one of the co-defendants cannot be said to be permissible merely because it does not reveal which one. Conversely if the persons identified as participants by the out-of-court declaration were not co-defendants, there would be no need to attempt concealment of their identities in the first instance); *United States v. DiGilio*, 538 F.2 972, 983 (3d Cir. 1976) (despite the district court's limiting instruction, the jury might well have drawn the inference that the defendant was the "blank" referred to in his codefendant's statement. Court could not approve of the practice of limited redaction in which the redaction exception gradually swallows up the *Bruton* rule).

B. The Redacted Statement When Viewed in Context Was Even More "Powerfully Incriminating."

If Bell's redacted confession is viewed in the context of the other evidence presented at trial,[14] its admission is even more "powerfully incriminating."[15] While Stacey

[14] Petitioner urges the Court to adopt a "contextual" approach for assessing whether or not a nontestifying codefendant's confession which has been redacted to eliminate the defendant's name, *but not any reference to his or her existence*, should be admitted as evidence at their joint trial. Although the confession in this case was "incriminating on its face," other redacted confessions, which are not facially incriminating, may nonetheless be so "powerfully incriminating" in the context of the other evidence presented at trial that there still exists an "overwhelming probability" that the jury will not likely obey the instructions to disregard the evidence. Such confessions should also be excluded.

[15] Other jurisdictions have adopted a "contextual" approach for assessing whether or not a nontestifying codefendant's redacted confession may be introduced as evidence at a joint trial. Under the "contextual" approach, a nontestifying codefendant's redacted confession may not be admitted at a joint trial where, in the context of the other evidence admitted at trial, there is a "substantial risk" that the jury will consider the codefendant's redacted statement in deciding the guilt of the defendant. *See, e.g., People v. Fletcher*, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); *People v.*

Williams may have been attacked by six individuals, only three of his alleged assailants were ever identified at trial —Petitioner, Tank, and codefendant Bell. Tracy Brumfield testified that she saw Stacey Williams being chased down the street by Tank, Petitioner, and several other guys. (T. 92, June 21, 1994) Shay Yarberough testified that Tank, Bell, Petitioner and three other guys beat Williams. The guys in this group wore jackets that said "Park Heights."[16] In the context of the other evidence presented at trial, the jury could not help but infer that the deletions in Bell's redacted statement were Petitioner's name and Tank's name.[17] *See, e.g., Smith v. United*

Kahn, 200 AD.2d 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Tucker*, 10 Haw. App. 43, 861 P.2d 24 (1993); *United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *Foster v. United States*, 548 A.2d 1370 (D.C. App. 1989); *People v. Cruz*, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); *State v. Johnson*, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

[16] "Deletion" in Bell's redacted statement also wore a black jacket with Park Heights written on the back. (J.A. 12)

[17] Codefendant Bell's redacted statement was read into evidence by Detective Pennington (J.A. 10-12) Immediately thereafter, the prosecutor asked Detective Pennington the following question:

> Q All right, now officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?
>
> A That's correct. (J.A. 12)

In the rebuttal portion of her closing argument, the prosecutor again linked Petitioner to codefendant Bell's redacted confession:

> And, ladies and gentlemen, you just don't rely on the State's witnesses. Mr. Bell, Mr. Bell tells you, an argument broke out between Tank and Stacey in the 500 block of Louden Avenue, somewhere down here. Stacey got smacked and then ran onto Wildwood. Me and a few other guys ran after Stacey. Me, and he was identified by Tracey, Kevin was identified by Tracey and Shay as being in the pack, and he was identified and he put himself there.

Thus, the prosecutor insured that the jury understood that the blank spaces and the terms "deleted" or "deletion" in codefendant Bell's redacted confession referred to Petitioner and Tank.

States, 561 A.2d 468, 474 (D.C. 1989) (admission of written confession with fourteen whited-out blank spaces in lieu of defendant's name when viewed in light of the other testimony adduced at trial virtually invited the jury to use defendant's name to "fill in the blanks"); *Clark v. Maggio*, 737 F.2d 471 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985) (the jury might well have filled in the blanks from other testimony that the codefendant had provided the police with two names deducing that those two names were the names of his codefendants).

As the Court of Special Appeals of Maryland observed in reversing Petitioner's judgment of conviction:

> Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited . . . to use [appellant]'s names to "fill in the blanks." *Id.* Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135, 88 S.Ct. at 1627. *See also Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence . . . connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified—Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the [jury] would consider th[e] evidence . . . in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both *Bruton* and *Richardson v. Marsh*." *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. App. 1988). (J.A. 83-84)

It is unrealistic to assume that the mere deletion of Petitioner's name from codefendant Bell's statement protected Petitioner from being "powerfully incriminat[ed]." The redacted statement was "vividly" incriminating. It was as "difficult to thrust out of mind" as a statement which actually named the defendant in *Bruton*. *See, Richardson*, 481 U.S., at 208. The introduction of codefendant's Bell's redacted statement "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination," *Bruton*, 391 U.S. at 128. The introduction of this statement likely had such a "devastating" effect upon the defense, *Bruton v. United States*, 391 U.S. 123, 136, that there was an "overwhelming probability" that the jury was unable to follow the court's limiting instruction, *Richardson*, 481 U.S., at 208. *See Greer v. Miller*, 483 U.S. 756, 766, n.8 (1987). The use of blank spaces or the terms "deleted or deletion" in redacted statements is simply insufficient to protect defendant's against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135. Thus, it was error to admit codefendant Bell's redacted statement.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

STEPHEN E. HARRIS
Public Defender of Maryland
ARTHUR A. DELANO, JR. *
NANCY S. FORSTER
Assistant Public Defenders
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8556
Counsel for Petitioner

* Counsel of Record